In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 793

LOUISIANA FINANCIAL ASSISTANCE COMMISSION, ET AL., APPELLANTS

v.

BRYAN POINDEXTER, ET AL., AND UNITED STATES OF AMERICA, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court entered on August 26, 1967, be affirmed.

OPINIONS BELOW

The opinion of the three-judge district court supporting the decree from which this appeal is taken (J.S. A17–A63) is not yet reported. A prior opinion of district court in this cause (J.S. A1–A16) is reported at 258 F. Supp. 158.

284-032—67

JURISDICTION

The decree of the three-judge district court (J.S. A17–A63) was entered on August 26, 1967. A notice of appeal was filed on September 8, 1967. The Jurisdictional Statement was filed on November 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTION PRESENTED

Whether the district court was correct in holding that the Louisiana statutes providing financial aid for tuition to attend private schools denied Negro children the equal protection of the laws.

STATEMENT

This is an appeal from a final judgment entered by a three-judge district court in the Eastern District of Louisiana, convened pursuant to 28 U.S.C. § 2281, holding invalid Act 147 of the 1962 Session of the Louisiana Legislature (L.S.A.–R.S. §§ 17:2951–2959). That statute authorizes State financial assistance to students attending private, non-sectarian elementary and secondary schools in Louisiana and establishes the Louisiana Financial Assistance Commission to administer the aid program.

The original complaint was filed on June 29, 1966, as a class action on behalf of Negro school children in Louisiana. The plaintiffs sought to enjoin "the enforcement, operation, and execution of [the Louisiana tuition grant statutes] by restraining certain officers of the State of Louisiana from the enforcement or execution of such statutes on the ground of the unconstitutionality of such statutes under the Constitution of

the United States." It was alleged that enforcement of the statute worked a denial of the equal protection of the laws on the basis of race in violation of the Fourteenth Amendment. Named as defendants were the Louisiana Financial Assistance Commission, the Louisiana State Board of Education, the Orleans Parish School Board, and the officers and members of each, and three private schools to which the plaintiffs had been denied admission.[1]

In response to this complaint, the defendants filed a motion to dismiss on the ground that the plaintiffs lacked standing to sue in that they sought only to enjoin the disbursement of public funds to students attending segregated schools and did not attack the constitutionality of the statute. The defendants also challenged the convening of a three-judge court. The district court overruled these objections in an opinion filed August 3, 1966 (J.S. A1–A16). The court *held* that "the plaintiffs have standing to sue, and to probe 'the purpose, mechanics, and effect of the plan' in light of present constitutional standards" (J.S. A10). On October 19, 1966, the United States filed its motion for leave to intervene as a party plaintiff pursuant to Section 902 of the Civil Rights Act of 1964 (42 U.S.C. 2000h–2) and Rule 24 of the Federal Rules of Civil Procedure.[2] The government alleged that Act 147 had

[1] The private schools were subsequently dismissed as parties defendant on the motion of the plaintiffs.

[2] Defendants objected to this intervention on the ground that it sought to have the statute declared unconstitutional on its face whereas the private plaintiffs had only asserted its unconstitutional application. This objection was overruled by the court.

been designed to provide segregated schools for white pupils and that its operation had resulted in the establishment of a state-supported segregated school system in the State of Louisiana in violation of the equal protection clause of the Fourteenth Amendment.

After a full hearing on the merits, the district court, on August 25, 1967, rendered its decision holding Act 147 unconstitutional and enjoining its further enforcement and execution (J.S. A17–A57). The court found that "[t]he purpose and natural or reasonable effect of this law are to continue segregated education in Louisiana by providing state funds for the establishment and support of segregated, privately operated schools for white children," and concluded that Act 147 violates the Equal Protection Clause because it constitutes "affirmative and purposeful state aid promoting private discrimination" (J.S. A19, A20).

In reaching its decision on the constitutionality of Act 147, the district court initially considered the purpose of that Act "in the light of its history and present setting." After tracing the early history of public education in Louisiana, the court focused on State legislative action after the first *Brown* decision in 1954, commenting that, "[a]s fast as the courts knocked out one school law, the legislature enacted another." Specifically, the court stressed that two of these invalidated statutes embodied tuition grant schemes "designed to provide a state-supported sanctuary for white children in flight from desegregated public schools" (J.S. A23, A19).[3]

[3] Act 258 of 1958 (L.S.A.–R.S. § 17:391.1–391.16) provided for tuition grants to "children attending non-sectarian non-

Although the court found that "the tuition grants have supplied a heavy predominance of funds needed to establish and maintain post-1954 and especially post-1962 private segregated schools," it was urged to save the statute for the future in light of a recent resolution adopted by Louisiana Financial Assistance Commission limiting grants, starting in June 1967, to applicants attending schools not "predominantly maintained" by these grants. That argument was premised on the "predominance" test used by the three-judge court in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va., not appealed), and the definition of a "public school" contained in Title IV of the Civil Rights Act of 1964. In rejecting this suggestion, the district court stated (J.S. A50–A51):

> When state funds predominantly support a private segregated school and when such a school, by congressional act, may be described as a "public school" for certain purposes of the Civil Rights Act of 1964, the state involvement

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public schools," provided there were "no racially separate public school" in the parish. This blatantly discriminatory statute was repealed in 1960 by Act 3 of the Second Extraordinary Session of 1960 (L.S.A.–R.S. § 17:2901 *et seq.*) which substituted a less openly discriminatory tuition grant system. This second statute was declared unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515. The case now before this Court represents the third grant statute and, as the district court noted, a fourth statute was enacted to take effect when Act 147 was invalidated—an eventuality that apparently was expected. The execution of this fourth statute has now been enjoined pending a determination of its constitutional validity in a subsequent proceeding before the district court in this case.

is a *double fortiori* case of unconstitutional state action. But decisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 per cent or adds up only to 49 per cent of the support of the segregated institution. The criterion is whether the state is so *significantly* involved in the private discrimination as to render the state action and the private action violative of the equal protection clause. (Here the plaintiffs ask only that the state be enjoined from paying the tuition grants; not that the schools be desegregated.)

* * * Any aid to segregated schools that is the product of the State's affirmative, purposeful policy of fostering segregated schools and has the effect of encouraging discrimination is significant state involvement in private discrimination. (We distinguish, therefore, state aid from tax benefits, free schoolbooks, and other products of the State's traditional policy of benevolence toward charitable and educational institutions.) [Emphasis and parentheses in original.]

ARGUMENT

The district court was correct in holding that the Louisiana tuition grant statute denied Negro school children in that State the equal protection of the laws guaranteed by the Fourteenth Amendment.[4] The court

[4] The appellants cite as error the refusal of the court below to dismiss the complaint, and complaint in intervention, on the ground of the lack of standing of the complaining parties. The right of Negro children to complain is established by their interest as public school age children in a meaningfully desegregated public education system which is directly affected by Act 147. See *e.g.*, *Abington School District* v. *Schempp*,

followed accepted standards for determining constitutionality when it considered the purpose of the statute and found that it was one of creating and maintaining a system of segregated schools in which white pupils could find a refuge from the desegregation of public schools. In reaching this determination, the court quite properly considered the historical setting of Act 147 as part of the context of facts and circumstances surrounding its enactment. See, *e.g.*, *Grosjean* v. *American Press Co.*, 297 U.S. 233; *Miller* v. *City of Milwaukee*, 272 U.S. 713; and especially *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 231; *Cooper* v. *Aaron*, 358 U.S. 1; *Louisiana* v. *United States*, 380 U.S. 145. The context clearly revealed that the statute was but one of the more recent in a long line of enactments by the Louisiana legislature directed at insuring a system of segregated schools. Specifically, the evidence disclosed that Act 147 was simply a more sophisticated substitute measure designed to replace the earlier tuition grant statute held unconstitutional in *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515.[5]

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374 U.S. 203, 224; *McCollum* v. *Board of Education*, 333 U.S. 203, 206. The standing of the United States is settled by Title IX of the Civil Rights Act of 1964 (42 U.S.C. § 2000h–2), which clearly authorizes it to raise all issues not foreign to the original action. See, *e.g.*, *Stewart-Warner Corp.* v. *Westinghouse Electric Corp.*, 325 F. 2d 822 (C.A. 2), certiorari denied, 376 U.S. 944.

[5] The appellants argue that the court erred in considering public statements made by legislators concerning the enactment of Act 147. Such statements are the traditional material from which legislative history is compiled. *Humphrey's Executor* v.

The court did not, however, rest its decision solely on the finding that Act 147 was *intended* to promote the establishment and maintenance of a system of segregated schools; there was also ample evidence that the statutory purpose had been fully effectuated. Thus, it was found that the tuition grant system had in fact provided "the financial means necessary to establish and maintain" the segregated private schools organized in its wake. Clearly, Act 147 had "significantly involved" the State in the racially discriminatory practices of some seventy-eight recipient private schools. See, *e.g.*, *Cooper* v. *Aaron*, *supra*; *Anderson* v. *Martin*, 375 U.S. 399; *Lombard* v. *Louisiana*, 373 U.S. 267; *NAACP* v. *Alabama*, 357 U.S. 449; *Hamm* v. *Virginia State Board of Elections*, 230 F. Supp. 156, affirmed *per curiam sub nom. Tancil* v. *Woolls*, 379 U.S. 19. Whatever the merits of the "predominant support" criterion adopted in *Griffin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va.), the court below was justified in not following it here.* Here—

United States, 295 U.S. 602; *Standard Oil Co.* v. *United States*, 221 U.S. 1. In reviewing such expressions of purpose, the court correctly admitted newspaper accounts, accompanied by the sworn statements of the authors as to their presence at the event and the accuracy of their reports, since Louisiana maintains no official records of legislative debates or committee proceedings and no verbatim transcript is available. See, *e.g.*, *United States* v. *Louisiana*, 225 F. Supp. 353, affirmed, 380 U.S. 145; *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649, affirmed *per curiam*, 368 U.S. 515; *Davis* v. *Schnell*, 81 F. Supp. 872, affirmed *per curiam*, 336 U.S. 933.

*The district court was also correct in rejecting the appellant's argument that it was bound, in passing on the constitutionality of the state action, by the definition contained in Title IV of the Civil Rights Act of 1964 of a "public school"

unlike the Virginia case—the court found the statute discriminatory in both purpose and effect, and concluded that the State could not effectively disentangle its involvement in the segregationist scheme by simply limiting the scope of the law. At least in the Louisiana context, it would be difficult to condone as "neutral" State payments made to segregated schools pursuant to a statute conceived in the hope of perpetuating educational discrimination even when the grants constitute less than half the school's operating funds. In the circumstances, we submit the court below was wholly warranted in striking down the whole of the statute and the attendant scheme.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHN DOAR,
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DECEMBER 1967.

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as one wholly or predominantly operated by government funds. By its very terms, that definition is given only for the purposes of Title IV and does not purport to limit the jurisdiction of the federal courts in defining the obligation of states under the Fourteenth Amendment.

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